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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 645

JOHN B. KEMMEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 72-78) is reported at 188 F. Supp. 736. The *per curiam* opinion of the court of appeals (Pet. App. A, p. 23) is reported at 295 F. 2d 712.

JURISDICTION

The judgment of the court of appeals was entered on November 3, 1961 (Pet. App. B, p. 24). A petition for rehearing was denied on December 5, 1961 (Pet. App. C, p. 25). The petition for a writ of certiorari was filed on January 3, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was deprived of a fair trial by the introduction of alleged hearsay and irrelevant evidence.

2. Whether the evidence was sufficient to prove that the government employees to whom petitioner offered a bribe were acting pursuant to their official duties.

3. Whether the court's charge to the jury was erroneous.

STATUTE INVOLVED

Section 201 of Title 18 U.S.C. provides in pertinent part as follows:

> Whoever promises, offers, or gives any money * * * to any * * * employee * * * acting for or on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency * * *, with intent * * * to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both.

STATEMENT

Petitioner was charged in a one-count indictment in the United States District Court for the Middle District of Pennsylvania with offering a $250 bribe to two employees of the Army Corps of Engineers with intent to induce them to act in violation of their lawful duty (R. 3). The jury found him guilty (R. 64), and he was sentenced to imprisonment for a period of eighteen months (R. 68, 79). On appeal, the conviction was affirmed (Pet. App. B, p. 24).

Pertinent evidence adduced at the trial may be summarized as follows:

Petitioner was the president and principal stockholder of John B. Kemmel, Inc., which had a painting sub-contract with Merritt-Chapman & Scott Corporation, the prime contractor with the United States Army Corps of Engineers for the construction of the Signal Corps Depot at Tobyhanna, Pennsylvania (R. 5, 6, 8). Plans and specifications required that all paint delivered for use on the job was to be inspected by taking samples from previously unopened cans and submitting such samples to the Corps of Engineers for testing and approval (R. 9, 23, 31, 38). Upon completion of three tests petitioner was notified that the paint being used did not meet the required standards and that all painting should cease (R. 12, 13, 15, 33, 34, 35).

One O'Donnell, who was the chief inspector for the Corps of Engineers, supervised nine inspectors whose duties were to see that all work done at the Tobyhanna Signal Depot was according to plans and specifications (R. 22). Golden was O'Donnell's assistant chief inspector (R. 41). On July 30, 1954, after Colonel Svoboda, the Engineer officer under whom O'Donnell and Golden worked, authorized petitioner to submit new paint samples, the two inspectors met petitioner at the paint shop (R. 26–27, 29, 41–42). Petitioner offered Golden $250 for himself and O'Donnell if, instead of taking samples according to the prescribed procedure, they would permit petitioner to substitute paint samples he had in three bottles in his car. Petitioner said to Golden, "I have 250 bills

if you people will accept my samples. * * * Why go to the trouble of taking additional samples?" (R. 28, 42). When Golden stated that petitioner was attempting to bribe a government agent, petitioner remarked, "Well, you fellows didn't see any money" (R. 28–29, 42).

Petitioner offered no defense evidence and did not testify in his own behalf.

ARGUMENT

1. There is no merit to petitioner's contention (Pet. 8–11) that he was deprived of a fair trial by reason of the introduction into evidence of prejudicial hearsay testimony. Certain evidence to which petitioner's counsel made only a general objection (R. 12, 35) was admitted as "verbal acts,"[1] *i.e.*, admissible not for the truth of the utterances but as part of the act described. Such utterances, which are admissible because they explain the conduct proved, are a recognized exception to the hearsay rule. See Wigmore, *Evidence* (3d ed.), § 1772. Inspector O'Donnell's report to Colonel Svoboda concerning the paint sampling (R. 35) and the notification by the Corps of Engineers to petitioner that the paint samples had been rejected (R. 12) explained why petitioner stopped further work on the contract and submitted new samples. Neither statement was of real importance in the case since petitioner did not contest the fact that his paint samples had been rejected.

[1] The court referred to them as "verbal facts" (R. 12, 35). Since petitioner's counsel did not ask for a definition of this phrase, it was not necessary that the court give a definition.

The challenged testimony of witness O'Donnell (R. 33–34) with respect to the rejection of the samples is equally insignificant. When asked what he did after he received a report that the first sample had failed, O'Donnell in a rambling account said that he was told to be present when the second group of samples was taken (R. 33). He then related an incident indicating that one "Sammy," petitioner's foreman, was trying to conceal the kind of paint he was using, that Colonel Svoboda told the contractor and the contractor shut down the job (R. 34). Upon completion of the testimony petitioner's counsel moved to strike it. Although the court offered to strike the evidence if defense counsel would "make the proper motion as to certain parts," counsel insisted that the court strike all the testimony. The court then properly ruled (R. 35):

> As to that motion, the motion is denied. As to the portion about Sammy running with the cans, we can see nothing to tie it up with this case, with this defendant, so that portion is stricken. But we are in a dilemma as to what defense counsel attempts to cover when it makes a sweeping motion when some is good and some is bad, we can't rule intelligently.

The court then said that it would admit only the evidence that the colonel stopped the painting (R. 35). The judge thus made clear the only part of the testimony which the jury was to consider.

2. Petitioner was convicted of violating 18 U.S.C. 201 which forbids bribes or offers of bribes to any employee "acting for or on behalf of the United

States, or any department or agency thereof, in any official function, under or by authority of any such department or agency * * *" (see *supra*, p. 2). The indictment alleged that, at the time of the bribe offer, O'Donnell and Golden were "employees acting for an agency of the United States, in an official function, by authority of such agency * * *" (R. 3). It was not necessary that the indictment spell out in detail the precise nature of the duties of the inspectors. This was properly a matter of proof at the trial.

Contrary to petitioner's contention (Pet. 11–13), the evidence was sufficient to show that O'Donnell and Golden were performing their official duties as employees of the Corps of Engineers at the time petitioner attempted to bribe them. O'Donnell and Golden, as part of their official duties as chief inspector and assistant chief inspector for the Corps of Engineers, were required to take paint samples from unopened cases at the Tobyhanna Depot to be sent to Philadelphia for laboratory testing (R. 22–24, 31, 38, 41). O'Donnell and Golden were obtaining new paint samples on direct orders from their superior, Colonel Svoboda, when the bribe offer was made (R. 41–42, 26–28).[2]

3. Petitioner's attack (Pet. 14–21) on portions of the court's charge is without merit. The charge cannot be read by lifting isolated phrases out of context, as petitioner does. When read in its entirety as it must be (*Boyd* v. *United States*, 271 U.S. 104, 107), it is clear that the charge was not erroneous.

[2] It is immaterial that Golden also had other duties relating to mason construction and storm drainage systems (R. 41).

In addition, we submit that petitioner failed to state "distinctly the matter to which he object[ed in the charge] and the grounds of his objection." Rule 30, F.R. Crim. P. It is true that petitioner submitted proposed instructions (R. 62–64) and that he objected when these instructions were not given verbatim (R. 47–50, 59–60). But as the trial judge stated (R. 50, 59–60), all the instructions were given in substance—at least with regard to the points petitioner raises in this Court. Petitioner merely excepted to these instructions without even generally specifying the grounds of his objections. He is therefore precluded from challenging the correctness of the charge on appeal.

a. The instructions required the jury to find the essential elements of the crime of offering a bribe. In order to convict, the jury was required to find that the two inspectors had a duty to take samples of paint from the gallon cans on the job (R. 57, 58) and that the bribe was offered with a "corrupt intent to have them not to do their work as their duty called for * * *" (R. 58; see R. 62). Although the court mentioned that the evidence indicated that the two inspectors were employees of the Corps of Engineers which was engaged in an official function in construction of the depot (R. 57), the court specifically required for conviction a finding that "the corrupt offer was made to one acting on behalf of an agency of the United States in an official function and that the offer was made to influence that person in doing some act or in the performance of some duty in his official capacity" (R. 59).

b. Petitioner claims (Pet. 17–18) that the case was submitted to the jury on the erroneous theory that petitioner could be guilty even if he was attempting to induce a lawful act since it allowed the jury to convict whether the paint in fact met the requirements or not (R. 57–58). This instruction, however, was clearly correct; the crucial issue under 18 U.S.C. 201 is whether petitioner offered the money with corrupt intent to have the inspectors not do their duty. If the inspectors had failed to take proper samples as petitioner was attempting to induce them to do, they would have violated their duty whether or not proper samples would have satisfied the later tests.[3]

c. The instructions were not confusing. While the court did not state in describing the evidence the brand names of the paint which was sampled nor require the jury to make a finding on this point (see R. 57), the brand names were irrelevant to any real issue. The charge properly authorized a verdict of guilty upon a finding that petitioner offered the money with the corrupt intent of inducing the inspectors not to sample the paint in the gallon cans in accordance

[3] The belated suggestion (Pet. 15–16) that the paint in the three bottles, which petitioner wanted the two inspectors to take as new samples, might have come from the gallon cans being used on the job, is not supported by any evidence. If that had been the case, petitioner undoubtedly would have so informed the inspectors and there would have been no need to offer a bribe. In the absence of any such evidence in the record, there was no reason for the court to charge the jury that in order to convict it must find that the paint in the bottles did not come from the paint to be used on the job—particularly since petitioner did not ask for this instruction.

with their duty, but to take the three samples from the bottles in petitioner's car.

The trial judge was mistaken when, in giving his recollection of the evidence, he said that Colonel Svoboda ordered O'Donnell to make other tests (R. 55), since O'Lonnell was actually told only to take samples. This does not alter the basic issue whether petitioner offered a bribe to the inspectors not to perform their duty. Moreover, the court was careful to state in other parts of the charge that the jurors alone were the sole judges of the facts (R. 51) and that their recollection of the testimony, not the court's, was controlling (R. 56).

d. The court did not fail to instruct the jury on the necessity for finding an offer of money. On the contrary, the charge specifically and repeatedly required a finding of the offering of "money" for a verdict of guilty (R. 56, 57, 61–62).

e. The charge was not broader than the indictment because it permitted the jury to find either an offer, a promise, or a gift of bribe money, while the indictment charged only an offer. Even though the court made cursory reference to all three acts as covered by the statute (R. 56), nowhere was the jury told that it could return a guilty verdict on the basis of a promise or gift. The court pointed out that the government was relying upon an offer and that "[u]nless you find that [petitioner's action] amounts to an offer, they haven't proved their charge" (R. 56). When the court specified the facts necessary for a finding of guilty, it spoke only of an offer of a bribe—not of a promise or gift (R. 57, 59).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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